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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

No. 84-1039

HARRY F. OLSON,

Petitioner,

versus,

WILLIAM D. LEEKE, Commissioner, DEPARTMENT OF CORRECTIONS and THE ATTORNEY GENERAL OF SOUTH CAROLINA,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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ATTORNEYS FOR RESPONDENTS.

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QUESTION PRESENTED

Is a commercial distributor of explicit sexual material entitled to a pre-indictment civil determination of obscenity, for the purpose of providing him notice of the illegality of selling the material?

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OPINION BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is reported at 744 F.2d 1061 (4th Cir. 1984) as reproduced in Petitioner's Appendix C at pages C.1-C.4.

JURISDICTION

Respondents do not question the Court's jurisdiction in this proceeding.

QUESTION PRESENTED

Is a commercial distributor of explicit sexual material entitled to a pre-indictment civil determination of obscenity, for the purpose of providing him notice of the illegality of selling the material?

ARGUMENT

A commercial distributor of explicit sexual material is not entitled to a pre-indictment civil determination of obscenity, for the purpose of providing him notice of the illegality of selling the material.

Petitioner, an employee of an adult bookstore, was convicted for selling obscene material in violation of South Carolina Code Ann. §16-15-260, et. seq.

(1976). (Tr. p. 1). Petitioner sold the materials in question to investigators from the Richland County Sheriff's Department. (Tr. p. 36, line 13 - p. 38, line 17; Tr. p. 82, line 6 - p. 83, line 3).

Petitioner's contention is that one who sells obscene material to consenting adults has no notice of the illegality of his actions until the material has been declared obscene in a civil hearing. Thus, according to Petitioner, he could not be tried for selling obscene material unless he continued selling it after it was declared obscene in a formal hearing. The Petition is not based on any search and seizure ground, nor it is based upon an allegation that the State failed to prove Petitioner had knowledge of the contents of the material. Petitioner's contention is simply

that one has no notice that material is obscene until its obscenity has been judicially determined.

Petitioner has not persuaded any court in the course of this action to adopt his reasoning, nor has he pointed out where any court in the nation has held that such a prior hearing is constitutionally required. The United States Court of Appeals for the Fourth Circuit properly disposed of Petitioner's claim as follows:

> It is then suggested that due process requires that a defendant, charged with selling explicit sexual material to willing adult purchasers, is entitled to a pre-indictment civil determination that the material is obscene. We find no such requirement in the case or in reason. In Miller v. California, 413 U.S. 15, 24 (1973), the court addressed the problem of fair notice and specifically concluded that observance of the prerequisites to prosecution as set forth in Miller would provide

> fair notice to commercial dealers in such materials.

Olson v. Leeke, 744 F.2d 1061 (4th Cir. 1984); see Petition, Appendix C, pp. 2-3. Thus, there is no conflict, confusion, or constitutional error such as requires this Court to grant certiorari.

In Miller, supra, this Court held that states can regulate works which depict or describe sexual conduct as long as the works, (1) taken as a whole, appeal to the prurient interest in sex; (2) portray sexual conduct in a patently offensive way; and, (3) taken as a whole, lack serious literary, artistic, political, or scientific value. 413 U.S. at 24. The Court held, "We are satisfied that these specific prerequisites will provide fair notice to a dealer in such materials that his public

and commercial activities may bring prosecution." (Citations omitted). 413 U.S. at 27.

Petitioner attempts to distinguish Miller in that Miller distributed his materials through the mail to unwilling recipients, while Petitioner sold his materials to consenting adults. Although Miller did mail material to unwilling recipients, the Court's holding on the adequacy of notice was not restricted to that situation. In Paris Adult Theatre I v. Slaton, 413 U.S. 49 (1973), this Court held that states have a legitimate interest in regulating the distribution of obscene material to consenting adults, as well as to juveniles and unconsenting adults. 413 U.S. at 57. The Court rejected the claim that distribution of obscene material only to consenting adults has

any special claim to constitutional protection. 413 U.S. at 68. The question of whether a seller of explicit sexual material has fair notice that the material may be found obscene is not affected by whether he distributes the material to consenting or unconsenting adults.

South Carolina Code Ann. §16-15-260 (1976), which is largely based on the Miller requirements, defines "obscenity," "sexual conduct," and related terms in a manner that is sufficiently clear and specific to provide fair notice of potential prosecution to commercial sellers of obscenity. "[A]ll that is required is that the language 'conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices... .' United States v. Petrillo, 332 US 1,

7-8...." "'... That there may be marginal cases in which it is difficult to determine the side of the line on which a particular fact situation falls is no sufficient reason to hold the language too ambiguous to define a criminal offense....' Id., at 7 ...." Roth v. U.S., 354 U.S. 476, 491-492 (1957); quoted in Miller, supra, 413 U.S. at 28, n.10.

In several cases dealing with the scienter requirement, this Court has held that criminal liability may be imposed on distributors of explicit sexual material if they are in some manner aware of the character of the material. Hamling v. U.S., 418 U.S. 87, 119-120 (1974); Ginsburg v. New York, 390 U.S. 629, 644 (1968); Mishkin v. New York, 383 U.S. 502, 510 (1966); Smith v. California, 361 U.S. 147, 154 (1959).

Here, Petitioner does not contend he did not know the character of the material. It is presupposed that one who knows the character of the material has notice of his potential criminal liability for its distribution.

South Carolina Code Ann. §16-15-260 (1976) and the Miller opinion provide Petitioner with adequate notice of the illegality of selling his material. The Court of Appeals properly found no requirement "in the cases or in reason" for a pre-indictment civil determination of the matter. Olson v. Leeke, supra.

The Petition for Certiorari should be denied.

CONCLUSION

For the foregoing reasons, Respondents submit that Petitioner's Petition for a Writ of Certiorari be denied.

Respectfully submitted,

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DONALD J. ZELENKA
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Attorney General

ATTORNEYS FOR RESPONDENTS.

March 12, 1985.
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